

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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In re

VERNON A. & TERRY L. JENKINS

Case No. 00-11957

Debtor

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MICHAEL J. O'CONNOR, AS CHAPTER 7  
TRUSTEE

Plaintiff

-against-

Adversary No. 00-90250

VERNON A. JENKINS and  
TERRY L. JENKINS

Defendants

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APPEARANCES:

O'CONNOR, O'CONNOR, MAYBERGER  
& FIRST, P.C.  
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Michael Jude O'Connor, Esq.  
Trustee

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Michael J. Toomey, Esq.

Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

**MEMORANDUM-DECISION AND ORDER**

The matter currently before the court is an objection by the Chapter 7 Trustee, Michael J. O'Connor ("Trustee"), to a homestead exemption claimed by the Debtors. The court has jurisdiction of this core proceeding via 28 U.S.C. §§157(b)(2)(B) and 1334(b).

## **FACTS**

The court finds the following facts:

- 1) The Debtors own the property in question, i.e., 7021 State Route 22, Granville, New York, and physically stayed in the property for certain blocks of time;
- 2) The Debtors actually occupied the structure at the time of filing; and
- 3) There was no running water or septic at the time of filing and there was no certificate of occupancy.

## **ARGUMENTS**

The Trustee contends that public policy dictates no homestead exemption should be permitted until a certificate of occupancy<sup>1</sup> has been issued and the structure is lawfully occupied. Thus, the Trustee bases his objection entirely on this court adopting a per se rule.

The Debtors reply by stating that whether or not a certificate of occupancy has been issued, the “home” exists, they reside there, and thus, an exemption should be allowed. The Debtors argue that this question is more than one of law; it requires a factual analysis.

## **DISCUSSION**

The State of New York has “opted out” of the federal exemption statute pursuant to 11 U.S.C. § 522(b)(1) and has enacted Debtor & Creditor Law § 282 *et. seq.* Section 282 is entitled “Permissible exemptions in bankruptcy” and states, in part:

[a]n individual debtor domiciled in this state may exempt from the property of the estate ... real property exempt from application to the satisfaction of money judgments under section ... fifty-two hundred six of the civil practice law and rules ...

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<sup>1</sup> A paper certifying that premises complied with provisions of zoning ordinance. BLACK’S LAW DICTIONARY 286 (4<sup>th</sup> ed.1968).

Section 5206 of the CPLR is entitled “Real property exempt from application to the satisfaction of money judgments” and states, in part:

(a) Exemption of homestead. Property of one of the following types, not exceeding ten thousand dollars in value above liens and encumbrances, owned and occupied as a principal residence, is exempt from application to the satisfaction of a money judgment, unless the judgment was recovered wholly for the purchase price thereof:

1. a lot of land with a dwelling thereon...

The purpose of this statute is to protect a homeowner from seizure of his or her home to satisfy a money judgment and to protect a debtor’s home in the event of bankruptcy. *In re Flatt* 160 BR 497, 499 (Bankr. N.D.N.Y. 1993) (citations omitted). The creation of a homestead is largely a question of fact based primarily on a determination of the owner’s intent *Id.* at 500 (citations omitted). There is no requirement that a plot of land be instantly habitable to qualify as a homestead. *In re Scott* 233 B.R. 32, 41 (Bankr. N.D.N.Y. 1998). Finally, exemption statutes are to be liberally construed in favor of a debtor and his family and their fresh start. *In re Milton* 103 B.R. 66, 67 (Bankr. N.D.N.Y. 1989) (citations omitted).

The trustee has the burden of proving that the exemption has not been properly claimed pursuant to F.R.B.P. 4003(3) and in the present case that burden has not been met. No analysis of, or citation to, the local law requiring a certificate of occupancy has been offered nor any discussion of penalties, if any, for violation of that law. While the trustee’s bright line theory of no certificate of occupancy equals no exemption is clean, easy, and predicable, it is not equitable. The concepts of a debtor’s homestead exemption and a debtor’s fresh start are inexorably intertwined. The mere fact that the issuance of a certificate of occupancy has not occurred is not dispositive and does not necessarily lead to the conclusion that a dwelling is not habitable and

that there has not been an actual physical presence combined with an intent to reside in that dwelling permanently. As with most issues in this court, the propriety of a homestead exemption is intensely factual.

Applying the above to the facts of the instant case leads this court to conclude that the exemption should be allowed. Here we have Debtors who state, in an affidavit dated September 12, 2000, that they resided in the subject premises for at least three months prior to the filing date. They further allege, in an affirmative defense dated December 13, 2000, that on the date of filing, the structure was divided into a livingroom, kitchen, and bathroom downstairs and two unfinished bedrooms. Further, that on the date of filing, the dwelling was heated by a woodstove. There is nothing in the record to contradict these facts as alleged. The court thus finds that the dwelling was complete to the extent necessary to allow actual occupancy and finds that the Debtors intended it to be their permanent residence. The fact that no certificate of occupancy had been issued in this case is not fatal to the debtors' claim and thus, the homestead exemption is allowed.

It is so ORDERED.

Dated: November 30, 2001

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Hon. Robert E. Littlefield, Jr.  
U.S. Bankruptcy Judge